Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

No. 04- 04 86

IN THE

Supreme Court of the United States

BOB GREEN, Harrison County Sheriff,
and
BOBBY WEAVER, Gregg County Sheriff,

Petitioners,

v.

DEAN KINNEY and DAVID HALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. DAVIS
Counsel of Record
CHRISTI J. KENNEDY
FLOWERS DAVIS, P.L.L.C.
Attorneys for Petitioners
1021 ESE Loop 323
Suite 200
Tyler, Texas 75701
(903) 534-8063

188454

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. This case raises important questions concerning the First Amendment and qualified immunity; specifically, the likelihood of clearly established law in *Pickering* balancing.

II. This case raises important questions concerning the scope of 42 U.S.C. § 1985(2) which should be decided by this Court.

III. This Court should also address Petitioners' claim of official immunity under state law, as the clearly established law inquiry is relevant to state law immunity.

LIST OF ALL PARTIES

Petitioners-Defendants:

Bob Green, Harrison County Sheriff
Bobby Weaver, Gregg County Sheriff

Plaintiffs-Respondents:

Dean Kinney
David Hall

Other Defendants:

Harrison County, Texas
Gregg County, Texas
City of Tyler, Texas
W.A. "Bill Young," Tyler Police Chief
East Texas Police Chiefs Association
Charles "Chuck" Williams, Marshall Police Chief
City of Marshall, Texas
Ted Gibson, Nacogdoches Police Chief
City of Nacogdoches, Texas
Ronnie Moore, Kilgore Director of Public Safety
City of Kilgore, Texas
J.B. Smith, Smith County Sheriff
Smith County, Texas

These other Defendants are being served as Respondents.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of all Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	5
Reasons for Granting the Petition	9
This Case Raises Important Questions Concerning The First Amendment And Qualified Immunity; Specifically, The Likelihood Of Clearly Established Law In *Pickering* Balancing.	9
This Case Raises Important Questions Concerning The Scope Of 42 U.S.C. § 1985(2) Which Should Be Decided By This Court.	16

Contents

Page

This Court Should Also Address Petitioners' Claim Of Official Immunity Under State Law, As The Clearly Established Law Inquiry Is Relevant To State Law Immunity. 20

Conclusion 21

TABLE OF CITED AUTHORITIES

Cases: *Page*

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 10

Board of County Commissioners v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) 10

Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998) 10

Brawner v. City of Richardson, 855 F.2d 187 (5th Cir. 1988) 14

Chahal v. Paine Webber, Inc., 725 F.2d 20 (2d Cir. 1984) 17

City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994) 20

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 10, 12

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) 11

Green v. Philadelphia Hous. Auth., 105 F.3d 882 (3d Cir. 1997) 11, 13, 14

Cited Authorities

Page

Haddle v. Garrison, 525 U.S. 121, 119 S. Ct. 489, 142 L. Ed. 2d 502 (1998) 19, 20

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 10

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) 10

Kokinis v. Ivkovich, 185 F.3d 840 (7th Cir. 1999) .. 16

Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988) .. 15

Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc) 13

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 2

Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) ..... *passim*

Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997) 10

Rainey v. Jackson State College, 481 F.2d 347 (5th Cir. 1973) 15

Reeves v. Claiborne County Board of Educators, 828 F.2d 1096 (5th Cir. 1987) 15

Cited Authorities

Page

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) 10

Shands v. City of Kennett, 993 F.2d 1337 (8th Cir. 1993) 16

Tedder v. Norman, 167 F.3d 1213 (8th Cir. 1999) .. 11, 13

Thompson v. Upshur County, 245 F.3d 447 (5th Cir. 2001) 11-12, 19

Wadewitz v. Montgomery, 951 S.W.2d 464 (Tex. 1997) 20

Waters v. Churchill, 551 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) 9

Williams v. Seniff, 342 F3d 774 (7th Cir. 2001) 16

Worrell v. Henry, 219 F.3d 1197 (10th Cir. 2000) 11, 14, 16

United States Constitution:

Amendment I ..... *passim*

Amendment XIV, Section I 3, 7

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 1367 2

42 U.S.C. § 1983 3

42 U.S.C. § 1985 ..... 8, 17

42 U.S.C. § 1985(2) ..... *passim*

42 U.S.C. § 1985(3) 17

TEX. LOC. GOV'T CODE ANN. § 85.003 ..... 11, 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed April 15, 2004 Revised May 3, 2004 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed July 9, 2003 ..... 130a

Appendix C — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated July 31, 2002 And Revised September 24, 2002 ..... 132a

Appendix D — Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Texas, Lufkin Division Dated May 12, 2000 And Filed May 16, 2000 ..... 198a

Petitioners Bobby Weaver and Bob Green respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 15, 2005.

OPINIONS BELOW

The en banc opinion of the Court of Appeals, review of which is sought by this petition, is reported as *Kinney v. Weaver*, 367 F.3d 337 (2004). It is reprinted in the Appendix of this Petition at pages A1a-A129a (hereinafter "App. A"). Along with the majority opinion, Circuit Judge Barksdale's concurring and dissenting opinion, joined by Circuit Judges Jones, Smith, Garza, and Clement, is reprinted at App. A76a, and Circuit Judge Jones' concurring and dissenting opinion, joined by Circuit Judges Smith, Barksdale, Garza, and Clement, is reprinted at App. A91a. Circuit Judge Jolly's dissenting opinion is reprinted in the Appendix. App. A129a. The court's order granting rehearing, dated July 9, 2003, is reported at *Kinney v. Weaver*, 338 F.3d 432 (5th Cir. 2003), and reprinted at App. B130a. The panel opinion of the Court of Appeals was reported as *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2003), and is reprinted at App. C132a. The panel opinion has since been withdrawn. The opinion of the United States District Court for the Eastern District of Texas is reported as *Kinney v. Weaver*, 111 F. Supp. 2d 831 (E.D. Tex. 2000), and is reprinted in the Appendix. App. D198a.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. § § 1331, 1343, and 1367. Petitioners appealed this case to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. A district court's denial of "qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

On July 31, 2002, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the decision of the district court. App. C132a. The Fifth Circuit subsequently granted en banc rehearing. App. B130a. The en banc appellate court affirmed in part and reversed in part the decision of the district court on April 15, 2004. App. A1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(2):

> (2) Obstructing justice; intimidating party, witness, or juror
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

STATEMENT OF THE CASE

Petitioners Bobby Weaver and Bob Green are the former sheriffs of Gregg County and Harrison County, respectively. They were ultimately responsible for the training of the officers under their command. Both sheriffs routinely sent their officers to the East Texas Police Academy ("ETPA"), a division of Kilgore College, for training. The ETPA provides basic and advanced training for law enforcement officers in East Texas. Neither the sheriffs nor the counties were contractually bound to send officers to the ETPA for training.[1]

Respondents Kinney and Hall were instructors at the ETPA. In August of 1998, Kinney and Hall testified as expert witnesses for the family of Edward Gonzales, a teenager who was fatally shot by a Kerrville, Texas police officer. In the Kerrville case, a suspect had fired forty shots while standing on the Guadalupe River Dam. The defendant police sniper testified that he first told the suspect to drop his rifle, and when the suspect lifted the rifle and pointed it at him, the officer killed the suspect in self-defense. Kinney and Hall testified that the Kerrville police officer had used excessive force and that the Kerrville police department had failed to implement the proper policies necessary to direct the conduct of officers acting as snipers. Both Kinney and Hall were to be paid for their services, but later declined payment.

---

1. The facts set forth in this Petition are taken exclusively from the Fifth Circuit opinions. App. A1a-A129a. This is an appeal from the denial of summary judgment, and Petitioners, as they must, for purposes of this appeal only, accept the Plaintiffs' version of the facts, where conflicting.

Following Respondents' testimony in the Kerrville case, various law enforcement officials in East Texas complained to Kilgore College President William Holda and threatened to stop using the ETPA for their officer training. In late September 1998, Police Chiefs for the cities of Tyler and Marshall wrote letters to Holda, complaining of Respondents' testimony against law enforcement in Kerrville. Both letters made it plain that the chiefs did not like Respondents teaching their officers. On September 30, 1998, Holda met with several law enforcement officials, including Petitioner Green, to discuss the complaints against Respondents. The officials communicated to Holda that they wanted Respondents off of the ETPA faculty because their testimony was in conflict with their duties as instructors, and that they would not send officers to ETPA for training if Respondents remained on the faculty. Petitioner Green and others later agreed to send officers to ETPA for training, but not for instruction by Respondents.

On October 22, 1998, the East Texas Police Chiefs Association held its quarterly meeting in Kilgore. Petitioners Green and Weaver attended the meeting. The minutes of that meeting stated, "it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either [Respondent]." Members of the East Texas Police Chiefs Association were openly critical of Respondents.

By November 1998, all of Respondents' classes had been cancelled. Respondent Hall resigned in January 1999 because he believed his contract would be cancelled. He returned to the job he had previously held, as a patrol officer for the City of Carrollton. Respondent Kinney remained at Kilgore College through the end of his contract. Kilgore College did not renew his contract as an ETPA instructor, but did offer

him a contract as a lecturer in Kilgore College's Criminal Justice Department, at a reduced salary.

On April 7, 1999, Respondents filed suit in federal district court against several police chiefs and sheriffs, including Petitioners, their respective cities and counties, and the East Texas Police Chiefs Association. Specifically, Respondents alleged that the defendants had blackballed them "in retaliation for their truthful testimony on behalf of the victim of a police shooting," thus alleging violations of: (1) the right to testify freely, 42 U.S.C. § 1985(2); (2) their rights to free speech under the First and Fourteenth Amendments; (3) their right to due process of law under the Fourteenth Amendment; and (4) Texas tort law.

Petitioners (along with other individual defendants) asserted the defenses of qualified immunity from the federal claims and state official immunity from the state law tort claims. Petitioners moved for summary judgment on the merits and on their immunity defenses. Police officials offered evidence of actual and potential disruption to their training programs and departments. Various police officials testified that Respondents' expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties, damaged teamwork required among those involved in training officers, threatened the confidentiality of information city and county officers shared with Kinney and Hall about their procedures and practices, undermined feelings of loyalty and confidence, and represented an improper use of the instructors' relationships with ETPA. The district court denied the summary judgment motion in its entirety. App. D198a.

On interlocutory appeal, Petitioners, along with other individual defendants, asked the Fifth Circuit to reverse the district court's denial of immunity. A divided Fifth Circuit panel affirmed the district court's denial of immunity on the § 1985, First Amendment, and state law claims, but reversed the district court's decision on the due process action. App. C132a. Thereafter, Petitioners, again along with other individual defendants, asked the Fifth Circuit to rehear its appeal en banc. The Fifth Circuit granted rehearing and heard oral argument. App. B130a.

A sharply divided en banc Fifth Circuit reached the same result. Nine circuit judges voted to affirm the denial of immunity as to the § 1985, First Amendment, and state law claims, but reverse the district court's decision on the due process action. App. A1a. The six remaining circuit judges wrote three dissenting opinions. As Circuit Judge Barksdale wrote:

> [I]t is simply nothing short of absurd to hold that the police chiefs and sheriffs are not vested with discretion in choosing which teachers to use (and pay) for training the police chiefs and sheriffs' own student-officers – the very persons the police chiefs and sheriffs are responsible for training. This cannot be the law.

App. A76a-77a.

REASONS FOR GRANTING THE PETITION

THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE FIRST AMENDMENT AND QUALIFIED IMMUNITY; SPECIFICALLY, THE LIKELIHOOD OF CLEARLY ESTABLISHED LAW IN *PICKERING* BALANCING.

This Court and the Courts of Appeals are littered with cases in which plaintiffs complain of the failure of local sheriffs to provide training for their officers. Yet, in the instant case, the Fifth Circuit has found that Respondents have alleged a constitutional violation against the Petitioner sheriffs for doing just that — taking an active role in the selection of training for their officers.

While the First Amendment protects all individuals' interests in free speech, government employees or contractors give up a certain amount of protection by virtue of their employment. *Waters v. Churchill*, 551 U.S. 661, 675, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. 551 U.S. at 674-75, 114 S. Ct. at 1888-89. The government cannot restrict the speech of the public at large just in the name of efficiency. *Id.* But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. *Id.*

In considering the relative rights of the government in the efficiency of its operations and those of an employee or contractor, a court must determine, inter alia, whether the public employer's legitimate countervailing government interests

outweigh the value of the employee's or contractor's protected speech. *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 675-76, 116 S. Ct. 2342 2347-48, 135 L. Ed. 2d 843 (1996); *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1689, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968). This balancing inquiry is a question of law. *Brady v. Fort Bend County*, 145 F.3d 691, 708 n.7 (5th Cir. 1998).

Under certain circumstances, a government official is protected by qualified immunity for actions taken against an employee as a result of that employee's speech, even where the actions taken violate the First Amendment. It is, by now, abundantly clear that government officials are immune from liability for civil damages so long as the officials' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). It is also clear that a plaintiff may only defeat qualified immunity by demonstrating that the unlawfulness of the official's conduct was apparent and that all reasonable officials realized the official's conduct violated the constitutional provision sued on. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987); *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997). Immunity is only lost where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). As this Court recently stated, qualified immunity is only defeated where the government official has "fair notice" or "fair warning" that his conduct violates another's constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002). Further, a

defense of qualified immunity is not properly rebutted by evidence that the official's conduct was malicious or otherwise improperly motivated. *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 1592, 140 L. Ed. 2d 759 (1998). Evidence concerning the defendant's subjective intent is irrelevant to the qualified immunity defense. *Id.*

The Fifth Circuit's finding that Respondents' interest in public speech outweighed Petitioners' legitimate governmental interests is erroneous in several regards. First, the majority characterized Respondents' interest in voluntary testimony as "extremely strong" (App. A47a), contrary to other circuit's holdings. *See Worrell v. Henry*, 219 F.3d 1197, 1209 (10th Cir. 2000); *Tedder v. Norman*, 167 F.3d 1213, 1215 (8th Cir. 1999); *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888-89 (3d Cir. 1997). Second, the majority characterized Petitioners' interests as irrelevant or minimal. Petitioners and other police officials believed the expert testimony hurt the close working relationship required between academy instructors and representatives of the cities and counties, damaged teamwork required among those involved in training officers, threatened the confidentiality of information city and county officers shared with Kinney and Hall about their procedures and practices, undermined feelings of loyalty and confidence, and represented an improper use of the instructors' relationships with ETPA. Third, the majority improperly considered evidence (or speculation) about Petitioners' motives (A53a-57a), contrary to *Crawford-El v. Britton*, 523 U.S. 574, 588 , 118 S. Ct. 1584, 1592, 140 L. Ed. 2d 759 (1998). Third, the majority failed to consider the responsibility placed on elected sheriffs in Texas. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 85.003 (a "sheriff is responsible for the official acts of a deputy"); *Thompson v. Upshur County*, 245 F.3d 447, 459

(5th Cir. 2001) (Texas sheriffs are liable for failure to train or supervise officers). Finally, the majority failed to consider that a sheriff is responsible for the safety of his employees, and Respondents' voluntary expert testimony was dangerous to officer safety. Respondents testified that the Kerrville police sniper used excessive force in shooting a suspect who had fired forty shots while standing on the Guadalupe River Dam, been told to drop his rifle, and then lifted the rifle and pointed it at the sniper. The court in the Kerrville case correctly determined that the sniper's conduct was not unconstitutional. If Respondents believed their testimony, they did not have any business teaching student officers.

1. This Court should review its First Amendment balancing test to discuss the fact-specific nature of that test and its concomitant result that the law is rarely "clearly established" in the context of the termination or discipline of a public employee.

Where *Pickering/Connick* balancing is required, the law is rarely "clearly established." This Court noted,

> [b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their supervisors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering, 391 U.S. at 569, 88 S. Ct. at 1735. Seven circuits, including the Fifth Circuit, have agreed that *Pickering/ Connick* balancing is a "fact-sensitive, context-specific" matter, which often precludes a finding that the law was so

clearly established that it put the government official on notice of the unconstitutional nature of his acts. *See* Circuit Judge Jones' Dissent, App. A104a-105a n.47. For example, the Tenth Circuit has held that "where *Pickering* balancing is required, the law is less likely to be well established than in other cases." *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc). Yet, the Fifth Circuit in the instant case has abandoned its prior reasoning and that of the other seven circuits to find that Petitioners did not enjoy qualified immunity where there was no similar Fifth Circuit precedent, and other circuits on similar facts reached a contrary result. Further, the Fifth Circuit inappropriately considered evidence (or speculation) about Petitioners' motives in arriving at the erroneous *Pickering* balance in this case. A53a-57a.

2. This court should review this case to resolve the conflict in the circuits created by the Fifth Circuit's decision. Suddenly, constitutional conduct in the Third, Eighth, and Tenth Circuits violates the Constitution in the Fifth Circuit.

At least three cases from other circuits support Petitioners' qualified immunity defense. In *Tedder v. Norman*, the Eighth Circuit held that it was not illegal for a police academy to demote its district director once the director "lost faith" in him when, like Kinney and Hall, he testified voluntarily as an expert witness against law enforcement in an excessive force case. 167 F.3d 1213, 1215 (8th Cir. 1999). Similarly, the Third Circuit exonerated a law enforcement agency that demoted one of its officers for voluntarily appearing as a character witness at a bail bond hearing. *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888-89 (3d Cir. 1997). Officer Green left the hearing and declined to testify upon learning the nature of the defendant's charges. The Third

Circuit found that the officer's decision to testify was activity protected by the First Amendment but that the agency's interest outweighed the public's interest in the voluntary testimony. 105 F.3d at 888. Finally, a third case, *Worrell*, held that a district attorney's interest in preventing disruptions with another law-enforcement agency outweighed a public employee's interests in avoiding retaliation for having previously testified as an expert witness against a police officer. *Worrell v. Henry*, 219 F.3d 1197, 1209 (10th Cir. 2000).

The Fifth Circuit's majority opinion does concede that "our past cases do not include one that has specifically addressed retaliation against instructors at a police academy." App. A68a-69a. However, instead of holding that the law was not clearly established, the court conducted a strained analysis of dissimilar cases to hold that the law was clearly established. Of the four cases relied upon by Fifth Circuit's majority, none provided fair notice to Petitioners that their conduct was unlawful.

In *Brawner v. City of Richardson*, for instance, the local newspaper received an anonymous letter from a police sergeant that described a departmental coverup of two incidents involving department officers. 855 F.2d 187, 189 (5th Cir. 1988). Supervisors questioned Brawner about the anonymous letter. Brawner was later suspended for refusing to answer further questions regarding the investigation. 855 F.2d at 190. This case is distinguishable from the present case and does not provide Petitioners with fair notice because: (1) it did not involve witness testimony, whether fact or expert; (2) there was no evidence that Brawner was responsible for training officers or that his speech affected his performance of his job or that of other officers; (3) there was no possible conflict of interest as the goals of the speech

(punishing and deterring crime) were the same as the departmental goals; and (4) the department did not identify any governmental interest that had been impaired.

Similarly, in *Matherne v. Wilson*, a deputy sheriff was fired for campaigning for a sheriff's political opponent in violation of departmental policy. 851 F.2d 752, 755 (5th Cir. 1988). This case is factually distinct from the instant case in that: (1) it did not involve witness testimony, whether fact or expert; (2) there was no evidence that Matherne was responsible for training officers for the department; (3) and there was no evidence that Matherne's decision impaired working relationships in the department or caused strife within the department. 851 F.2d at 761.

The two "witness" cases cited in the Fifth Circuit opinion are also very different from this case. In *Rainey v. Jackson State College*, Rainey, prior to his employment at the college, had testified as an expert for the defense in a criminal case charging that a film was obscene. 481 F.2d 347, 349 (5th Cir. 1973). The college withdrew Rainey's contract because of his testimony at the obscenity trial and the resulting publicity. 481 F.2d at 350. This case does not provide any notice to Petitioners as it did not concern disruption of college functions or take into account unique law enforcement interests. *Reeves v. Claiborne County Board of Educators* is similarly remote. 828 F.2d 1096 (5th Cir. 1987). In *Reeves*, the plaintiff testified as a fact witness in a civil rights trial on behalf of individuals who had alleged they were fired for political activity in the last election. 828 F.2d at 1098. Plaintiff herself later filed suit, saying that she had been reassigned in retaliation for her earlier truthful testimony. Reeves testified as a fact witness under subpoena, not as a voluntary expert witness. There was no evidence that her

testimony disrupted the efficient functioning of her school, and her employment did not involve the special concerns attendant upon law enforcement.

Finally, the decisions relied upon by the Fifth Circuit ignore the heightened interest of law enforcement agencies. *See Shands v. City of Kennett*, 993 F.2d 1337, 1344-45 (8th Cir. 1993); *Worrell*, 219 F.3d at 1208 (these concerns are heightened in smaller offices and departments, where relatively minor disturbances in morale may create significant problems"); *Williams v. Seniff*, 342 F3d 774, 783 (7th Cir. 2001) ("'deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement'") (quoting *Kokinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999)).

THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE SCOPE OF 42 U.S.C. § 1985(2) WHICH SHOULD BE DECIDED BY THIS COURT.

Petitioners also asserted that they were entitled to qualified immunity from Respondents' section 1985(2) "witness retaliation" claims. Specifically, Petitioners contended that they had not violated the statute and that the statute's prohibitions were not sufficiently clear in 1998 to give them notice that their conduct violated the statute. The Fifth Circuit disagreed, extending section 1985(2) protection to expert witnesses and holding that Petitioners' decision to send students to teachers other than Respondents constituted an injury to Respondents' property. The Fifth Circuit denied Petitioners' qualified immunity on the grounds that expert witnesses had always been protected under section 1985(2) and that this Court has decided that section 1985(2) protects at-will employment from interference.

1. This Court should discuss section 1985(2) to clarify that it was not intended to prevent local law enforcement officials from enrolling their students in classes, based on the instructor's prior expert testimony in federal court.

The Fifth Circuit's expansive reading of section 1985 extends the statute beyond any anticipated scope. It is unclear from the text of section 1985 whether it is meant to extend to expert witnesses at all. The statute provides,

> if two or more persons . . . conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . the party so injured may have an action for the recovery of damages. . . .

42 U.S.C. §§ 1985(2), (3). The statute does not expressly mention "expert" witnesses at all. Further, the only case to consider whether expert testimony falls within the statute's protection was significantly different. In *Chahal*, the Second Circuit held that a party could proceed with its section 1985(2) action where a prospective expert witness withdrew from the case one week prior to trial as a result of intimidation, thus preventing the party from asserting its claim. *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 22-24 (2d Cir. 1984).

The possible results of the Fifth Circuit's holding are mind-boggling. This holding does not merely punish a wrongdoer for intimidating an expert witness and thus,

preventing a party from being able to assert its claim. On the contrary, this holding contemplates punishing a party and counsel for refusing to hire an expert witness on the basis of his prior testimony. Judge Barksdale's dissent identifies the logical result:

> Consider the wide-ranging, truly absurd results arising out of extending § 1985 to cover post-testimony economic injury to expert witnesses of the type claimed here. Arguably, every person who testifies as an expert and is later denied employment could file an action under § 1985 against the would-be employer. For example, assume an urban planner routinely testifies in litigation against cities. Is a city now subject to § 1985(2) liability if it refuses to hire that person if he applies for a job in its planning department?

Kinney, 367 F.3d at 378 (Barksdale, J., dissenting), App. A83a.

2. This Court should determine whether Petitioners' discretionary decision to send their officers to be instructed by persons other than Respondents constituted an "injury to Respondents' property" within the meaning of section 1985(2).

Petitioners did not terminate the at-will employment of Respondents. On the contrary, Respondent Hall resigned from the ETPA to return to the City of Carrollton Police Department. Respondent Kinney was re-assigned as a lecturer in Kilgore College's Criminal Justice Department. Petitioners, as sheriffs, are charged by law with the duty of training their officers. In fact, sheriffs can be liable for injuries resulting from their failure to do so. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 85.003 (a "sheriff is responsible for the official

acts of a deputy"); *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001) (Texas sheriffs are liable for failure to train or supervise officers).

The Fifth Circuit asks too much of a local sheriff by requiring that he adequately train his deputies, making him responsible for the result, but not allowing him discretion in where to send the deputies for training.

3. This Court should consider whether Petitioners were entitled to qualified immunity for their choice in sending their deputies to instructors other than Respondents. In order to defeat qualified immunity, a plaintiff must allege the violation of a clearly established right of which a reasonable officer would have known. In the context of section 1985(2), Respondents have failed to allege a violation and failed to demonstrate that the right was clearly established.

Respondents clearly cannot allege the violation of section 1985(2) because they offered expert testimony and did not suffer an injury in their person or property on account of having so attended or testified. Further, the law as identified by the Fifth Circuit was not clearly established at the time Petitioners chose not to enroll their deputies in Respondents' classes in 1998. Petitioners stopped sending their student-officers to Respondents' classes in October 1998. ETPA, not Petitioners, removed Respondents' courses from the ETPA schedule in November, 1998. This Court did not decide *Haddle v. Garrison* until December of 1998. Prior to the December 1998 *Haddle* decision, there was a conflict of holdings of the First, Ninth, and Eleventh Circuits regarding whether a conspiracy to deprive a person of at-will employment constituted an injury to the person or property

within the meaning of section 1985(2). *Haddle v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 491, 142 L. Ed. 2d 502 (1998). Accordingly, the law was not clearly established, and Petitioners were entitled to qualified immunity.

THIS COURT SHOULD ALSO ADDRESS PETITIONERS' CLAIM OF OFFICIAL IMMUNITY UNDER STATE LAW, AS THE CLEARLY ESTABLISHED LAW INQUIRY IS RELEVANT TO STATE LAW IMMUNITY.

As government officials, Petitioners are immune from suit for actions done in a good faith performance of discretionary duties within the scope of their authority. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). The test for good faith is whether a reasonably prudent official, under the same or similar circumstances, could have believed his actions were reasonable. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). Thus, whether the law was clearly established at the time of the officers' actions is relevant to the official immunity determination. *Chambers*, 883 S.W.2d at 656. Petitioners are entitled to official immunity because their actions in communicating with President Holda and changing the training of their officers were part of their discretionary duties, within the scope of their authority, and done in good faith.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

ROBERT S. DAVIS
Counsel of Record
CHRISTI J. KENNEDY
FLOWERS DAVIS, P.L.L.C.
Attorneys for Petitioners
1021 ESE Loop 323
Suite 200
Tyler, Texas 75701
(903) 534-8063